Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

ANTON M. MARKU; ROZE MARKU; ELDE MARKU; ARETA MARKU,
Petitioners,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit erred and deprived Petitioners of due process by failing to reopen Petitioners' removal proceedings after concluding that the clear mistakes of Petitioners' prior counsels unquestionably harmed Petitioners.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Anton M. Marku, Roze Marku, Elde Marku, and Areta Marku respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on October 5, 2006 and February 15, 2007, respectively.

OPINIONS BELOW

The opinion of the Immigration Judge (App. E1 hereto) is unreported. The opinions of the Board of Immigration Appeals (App. C1 and D1) are unreported. The opinion of the Sixth Circuit Court of Appeals on the merits (App. B1), of which review is sought, is unreported. The order of the Sixth Circuit denying the petition for panel rehearing and suggestion for rehearing en banc in such case (App. A1) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. B1) was entered on October 5, 2006. The court denied Petitioners' timely petition for rehearing on February 15, 2007 (App. A1). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United

States courts of appeal on the same important matter and has sanctioned a decision of the Board of Immigration Appeals that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

RELEVANT PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(42) provides in relevant part:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1158(a)(1) provides:

> Any alien who is physically present in the United States or who arrives in the United

States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

STATEMENT

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA") and the Sixth Circuit Court of Appeals denying a motion to reopen based on ineffective assistance of counsel where the poor performance of Petitioners' prior counsels unquestionably harmed them and resulted in the dismissal of the administrative appeal from their credible asylum claim.

(ii) Proceedings at the Immigration Court

Anton Marku ("Mr. Marku"), his wife Roze Marku ("Ms. Marku"), and their daughters Elde Marku ("Elde") and Areta Marku ("Areta") are citizens of Albania. Elde and Areta were lawfully admitted to the Untied States on September 29, 1996. They were preceded by their parents,

who entered the United States without inspection on September 11, 1996.

Mr. Marku filed a timely affirmative asylum application with the Immigration and Naturalization Service ("INS")[1] in May 1997. The INS referred this application to the Immigration Court on July 23, 1997. The INS alleged that Mr. and Ms. Marku were removable for having entered the United States without inspection, in violation of 8 U.S.C. § 1182(a)(6)(A)(i). The INS alleged that Elde and Areta were removable for having been inadmissible at the time of admission, in violation of 8 U.S.C. § 1227(a)(1)(A).

In removal proceedings conducted in Detroit, Michigan, they conceded removability, renewed Mr. Marku's asylum application, and applied for withholding of removal and the alternative relief of voluntary departure.

Following a November 25, 1998 merits hearing, the Immigration Judge ("IJ") denied their asylum claim. The IJ concluded that Mr. Marku's claim was credible but doubted

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[1] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

that he was harmed for political reasons. The IJ also concluded that Mr. Marku lacked a well-founded fear of future persecution. App. E1.

(iii) Proceedings at the Board of Immigration Appeals

Petitioners timely appealed to the BIA. During the course of the appeal, their attorney, the BIA and the State of Michigan suspended their attorney, Valerie Yaeger.

Because Ms. Yaeger did not file a brief with the BIA, the INS moved for summary dismissal. Following Ms. Yaeger's suspension, the BIA sent briefing schedules to Mr. Marku but because Ms. Yaeger and her father/co-counsel, Noel Lippman, failed to notify the BIA that Mr. Marku had moved, he did not receive the briefing notice.

On December 11, 2003, the BIA affirmed the IJ's decision. App. D1. Petitioners did not receive the decision because it was sent to their previous address.

When Petitioners learned of the decision, after being notified to appear for their removal, they filed a motion to reopen with the BIA on March 7, 2005, alleging ineffective assistance of counsel. They complied with the requirements for making a claim of ineffective assistance of counsel. Matter of Lozada, 19 I. & N. Dec. 637 (BIA 1988).

On July 25, 2005, the BIA denied their motion to reopen. The BIA concluded that Petitioners were not harmed by their prior counsels' performance. App. C1.

Petitioners timely petitioned for review to the Sixth Circuit Court of Appeals.

(iv) Statement of Facts

The IJ found that Mr. Marku presented a credible asylum claim. App. E1. Mr. Marku's family has a long tradition of opposing monarchy and communism in Albania. The communists imprisoned his grandfather, Mark Marku ("Mark"), because of his opposition to agrarian reforms. His grandfather died in prison.

The communists labeled his family "kulaks" because of their opposition to the communists' policies. In 1945, the communists arrested Mr. Marku's father, Marash Marku ("Marash"), because Marash protested Mark's imprisonment. Marash was imprisoned for ten years. Ms. Marku's father was also imprisoned because of his opposition to communism; he died in prison.

In school, Mr. Marku was ostracized and deprived of the educational opportunities afforded other students because of his family's political beliefs. During his compulsory military service, Mr. Marku was not given a weapon and was instead forced to perform the most

difficult, menial tasks. During his service, he was interrogated because his family history made his commanding officers suspect him of purposely trying to undermine the military.

On August 25, 1989, Mr. Marku's mother committed suicide because she could no longer take the pressure of being a kulak. On September 9, 1990, while standing on a bread line, Marash criticized the quality of the food and the communist government providing it. He was upset that he could not see his sister, who lived in Yugoslavia. Two days later, on September 11, 1990, a police car hit and killed him. The driver was never arrested.

Distraught after learning of his father's death, Mr. Marku went to the police station to inquire about the investigation. Police officers placed him in an isolation room. When he asked about his father's death, officers tied him down. They beat him and wanted to know why he thought the police were involved. The officers beat him until he lost consciousness. When they finally released him, the officers told him that he would face the same fate as his father if he told anyone that the police were responsible for his father's death.

On December 13, 1990, Mr. Marku participated in a large pro-democracy demonstration took place in Shkoder, the Markus' hometown. The demonstration culminated in the toppling of a monument of the communist leader Enver Hoxha. Mr. Marku subsequently joined the anti-communist group "December 13, 1990" that was formed afterwards. He also joined the Politically Persecuted organization.

On January 4, 1991, the secret police searched for Mr. Marku at his home. They waited until he came home and then arrested him. The officers showed Mr. Marku his picture taken from the videotape of the demonstration made by the secret police. The police detained Mr. Marku until January 12, 1991. During this detention, the officers beat and tortured Mr. Marku and demanded the names of the leaders of the pro-democracy movement. Finally, after sustained public outcry, the police released Mr. Marku and the others who took part in the demonstration. Mr. Marku joined the Democratic Party ("DP") in 1991 when he received a membership card while in jail.

The communists stole the March 31, 1991 elections. On April 2, 1991, Mr. Marku took part in the DP's protest against the communists' election fraud. The

police cracked down on the demonstration and killed four protestors.

Mr. Marku escaped and took his family to Yugoslavia on April 6, 1991. The Yugoslav authorities arrested them and returned them to Albania on April 14, 1991. He escaped detection by the Albanian authorities by using a false name.

In 1993, Mr. Marku joined the Christian Democratic Party ("CDP"). He left the DP because he believed it was not working to return property to the rightful owners. The CDP opposed the draft constitution in 1994 because it gave the current president, who belonged to the DP, the powers of a king.

In October 1994, the land committee tried to divide Mr. Marku's land. He objected and was arrested. During his two-day detention, the police beat him and forced him to sign a document agreeing to divide his land.

During the 1996 elections, Mr. Marku witnessed the DP's electoral fraud. Mr. Marku told an Italian newspaper about the manipulations he witnessed and compared them to the communists' manipulations in 1991.

On June 8, 1996, Mr. Marku was waiting for a bus to take him to the city of Shkoder when his friend drove by. Mr. Marku accepted his friend's offer of a ride. On the

way to Shkoder, the head of the local DP also got in the car. Before reaching Shkoder, the police stopped the car. During the subsequent search, the police found a pistol underneath Mr. Marku's seat. Mr. Marku believes this was a set-up.

At the police station, Mr. Marku asked for an attorney and refused to admit guilt. For seven days, police officers beat him and deprived him of food. Eventually, a court sentenced him to 45 days in jail and a fine.

Ms. Marku received almost daily threats against her children during this period. These threats were a continuation of the threats she received since the death of her father-in-law. After his release from custody, Mr. Marku arranged to come to the United States with his family.

Mr. Marku feels that his life and the lives of his family will be in danger in Albania because he will be viewed as being a long-standing opponent to the politically powerful.

(v) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction in the Sixth Circuit Court of Appeals was proper. 8 U.S.C. § 1252(a)(2)(B). Venue was proper in the Sixth Circuit because an IJ sitting in Detroit,

Michigan completed the Immigration Court proceedings. 8 U.S.C. § 1252(b)(2).

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the BIA that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

I. The Ineffectiveness of Petitioners' Counsel Unquestionably Prejudiced Petitioners Because it Completely Deprived them of any Meaningful Review of the IJ's Decision

Ineffective assistance from their previous attorneys deprived the Markus's of their right to full and fair consideration of their asylum application. They reasonably relied on their attorneys to represent them before the BIA and to file a brief. They did not know that Ms. Yaeger was suspended and they were told that her father, Mr. Lippman was handling their appeal during Ms. Yaeger's "absence." It is reasonable for a stranger in this country, unfamiliar with the intricacies of immigration law, to trust and rely on

his attorney. Monjaraz-Munoz v. INS, 327 F.3d 892, 896 (9th Cir. 2003).

Although a removal proceeding:

> is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

U.S. ex. rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975).

Their previous attorneys' errors have rendered "the adversary process itself ... presumptively unreliable." Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985 (2000) (internal citations omitted).

> In addition to a non-citizen's ability to defend against removability and to seek remedies, a respondent in a removal hearing is afforded some rights that go to the fundamental fairness of these proceedings. ... A respondent also has the right to be represented by counsel of his own choosing at no expense to the government. The Supreme Court has stated that: "*We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important.*" Ardestani v. INS, 502 U.S. 129, 138, 112 S. Ct. 515, 116 L. Ed. 2d 496 (1991). Furthermore, courts, emphasizing the importance of counsel at deportation

> proceedings, will not lightly find a waiver of that right.

Detroit Free Press v. Ashcroft, 303 F.3d 681, 698-99 (6th Cir. 2002) (emphasis added) (internal citations omitted).

Aliens present in the United States, even those "whose presence ... is unlawful, involuntary, or transitory," are protected by the Fifth Amendment due process clause. Mathews v. Diaz, 426 U.S. 67, 77, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); see also Scorteanu v. INS, 339 F.3d 407, 413 (6th Cir. 2003). Among these protections is the "constitutionally protected right to petition our government for political asylum." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982). This right "is but a fragile one. There is no constitutionally protected right to political asylum itself. *Although fragile, the right to petition is nevertheless a valuable one to its possessor. By it he may at least send his message and be assured of the ear of the recipient.*" Id. (emphasis added).

The IJ and BIA have a duty to assist in clarifying and bringing out evidence in support of an asylum seeker's claim. Matter of S-M-J-, 21 I. & N. Dec. 722, 723-24 (BIA 1997) (asylum proceedings involve a cooperative, not adversarial, approach); see also Qiu v. Ashcroft, 329 F.3d 140, 156 n.17 (2d Cir. 2003); Shoafera v. INS, 228 F.3d

1070, 1075 (9th Cir. 2000) Due process protections against ineffective assistance of counsel are necessary to protect asylum applicants and carry out the government's obligations under American and international asylum law.

The Immigration and Nationality Act and the United States' obligations under international law evince "a clear intent to grants aliens the right to submit and the opportunity to substantiate their claim for asylum." Haitian Refugee Center, 676 F.2d at 1038; see also Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984). The right encompasses more than the right to apply for asylum and have a hearing before an Immigration Judge. It includes the right to seek review by the BIA and the Courts of Appeals. 8 U.S.C. §§ 1252(a)(2)(B), (B)(ii) (preserving judicial review over even discretionary denials of asylum applications); 8 U.S.C. § 1182(a)(9)(B)(iii)(II) (aliens with pending asylum applications are not considered to be unlawfully present).

When an asylum applicant claims that his attorney failed to adequately present his claim, the BIA cannot dismiss the allegations out of hand and must address the allegations. Filja v. Gonzales, 447 F.3d 241, 256 (3d Cir. 2006) (reversing the denial of an Albanian asylum applicants motion to reopen based, in part, on ineffective

assistance of counsel). The reviewing courts cannot be "unduly tolerant" of ineffective assistance of counsel. N'Diom v. Gonzales, 442 F.3d 494, 501 (6th Cir. 2006) (Martin, J., concurring).

> Asylum petitions of aliens seeking refuge from alleged persecution are among the hardest cases faced by our courts. They are not games. And, despite their volume, these suits are not to be disposed of improvidently, or without the care and judicial attention—by immigration judges, in the first instance, and by federal judges, on appeal—to which all litigants are entitled. We should not forget, after all, what is at stake. For each time we wrongly deny a meritorious asylum application...we risk condemning an individual to persecution. Whether the danger is of religious discrimination, extrajudicial punishment, forced abortion or involuntary sterilization, physical torture or banishment, we must always remember the toll that is paid if and when we err.

Xue v. BIA, 439 F.3d 111, 113-14 (2d Cir. 2006) (internal footnotes and citations omitted).

The ineffective assistance of counsel in this case deprived bona fide asylum applicants of the procedural protections designed to ensure that refugees are not returned to the country of persecution. The Markus were persecuted in Albania because of their political opinion and activities and they continue to have a well-founded fear of

future persecution. The IJ clearly erred as a matter of law and abused his discretion in denying their application. If given, they could have demonstrated their eligibility for asylum on appeal to the BIA or Sixth Circuit.

In denying their appeal, the BIA relied on Ms. Yaeger's Notice of Appeal. Four of the seven grounds for appeal in this cookie-cutter notice clearly do not apply to this case. For example, Ms. Yaeger challenged the IJ's credibility finding when the IJ found Petitioners credible. It is safe to assume that Ms. Yaeger did not tailor the notice of appeal to the case at all. The BIA's reliance on this notice in issuing its decision completely deprived the Markus of their appeal as of right. This Court has sharply criticized attorneys who submit cookie-cutter briefs. See Lumaj v. Gonzales, 462 F.3d 574, 576 n.1 (6th Cir. 2006).

If the Markus had the opportunity to present their claim to the BIA, they would have established their eligibility for asylum and shown how the IJ erred in denying their claim. The IJ held that the Markus gave an accurate account of the events described in their application and believed that these events actually occurred. Thus, their testimony is deemed true. See Gilaj v. Gonzales, 408 F.3d 275, 285-86 (6th Cir. 2005). Mr. Marku lost his

parents because of persecution by the communists. Mr. Marku himself was arrested and beaten several times.

An asylum applicant who has suffered past persecution "is not barred from a grant of asylum" in the absence of a well-founded fear of persecution if the "applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(B). This "general humanitarian principle" acknowledges that a refugee who "has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, *in view of his past experiences, in the mind of the refugee*." Matter of Chen, 20 I. & N. Dec. 16, 19 (BIA 1989). "For example, there may be cases where it is appropriate to offer protection to applicants who have suffered persecution in the past and who are at risk of future harm that is not related to a protected ground." 63 Fed. Reg. 31945, 31947 (June 11, 1998).

"Other serious harm" is "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so

serious that it equals the severity of persecution." 65 Fed. Reg. 76121, 76127 (2000); Liti v. Gonzales, 411 F.3d 631, 641-42 (6th Cir. 2005) (directing the BIA to consider an applicant's eligibility for humanitarian asylum based on the possibility that the applicant will suffer other serious harm). Given the harm suffered by Mr. Marku and his family, he was entitled to consideration of his humanitarian asylum claim and would have been able to present this claim but for his previous attorney's ineffective assistance of counsel.

The Markus lost their right to seek judicial review. 8 U.S.C. § 1252(a)(2)(B)(ii). Congress specifically provided for judicial review of asylum applications even through it sought to eliminate judicial review of many other types of discretionary decisions. 8 U.S.C. § 1252(a)(2)(B). Given the serious problems with the adequacy of administrative review of asylum claims, this is not a hollow right.

The BIA's recent decision-making highlights the need for effective representation and meaningful judicial review. The Seventh Circuit has estimated that in the year ending September 23, 2005, it reversed, in whole or in part, 40 percent of the BIA decisions that it reviewed on the merits. In comparison, it reversed only about 18 percent of other civil cases in which the United States was the

appellee. Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005). The high reversal rate is because "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice ... All that is clear is that it cannot be in the interests of ... the effective enforcement of the nation's removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security ... and the Department of Justice." Id. The decision-making process in many removal cases is "so inadequate as to raise questions of adjudicative competence." Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2004). The Sixth Circuit has noted "the significantly increasing rate at which adjudication lacking in reason, logic, and effort from other immigration courts is reaching the federal circuits." N'Diom, 442 F.3d at 500 (Martin, J., concurring).

The Sixth Circuit, as well as the Seventh, First, and Third Circuits have all recently reversed decisions from the BIA denying asylum to Albanians. See Gilaj, 408 F.3d 275 (applicant suffered past persecution); see also Gjerazi v. Gonzales, 435 F.3d 800 (7th Cir. 2006) (finding harm suffered by alien was politically motivated); Shtaro v. Gonzales, 435 F.3d 711 (7th Cir. 2006); Caushi v. Attorney General, 436 F.3d 220 (3d Cir. 2006) (finding applicant

suffered past persecution); Halo v. Gonzales, 419 F.3d 15 (1st Cir. 2005) (rejecting BIA's decision that applicant did not face a reasonable possibility of persecution in Albania); Voci v. Gonzales, 409 F.3d 607 (3d Cir. 2005) (applicant suffered past persecution). The BIA, Immigration Courts, and the Citizenship and Immigration Service ("CIS") have granted asylum to a considerable number of Albanian asylum applicants.[2] These statistics may not entitle the Markus to asylum but they represent compelling evidence that the BIA should not have dismissed their claim out of hand because a significant portion of Albanian asylum applicants have been found to have either a well-founded fear of future persecution or to be entitled to humanitarian asylum. That the federal and administrative courts and the CIS continue to find that Albanians have suffered past persecution and have a well-founded fear of future persecution underscores the prejudice suffered by the Markus when they lost their right to present their asylum claim to the BIA and the Court.

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[2] The Immigration Court's Asylum Statistics from 1997 to 2006 are available at http://www.usdoj.gov/eoir/efoia/foiafreq.htm The CIS's 2004 Yearbook of Immigration Statistics and is located at http://uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf. The Court can take judicial notice of these commonly known facts.

II. The Sixth Circuit's Decision Creates a Circuit Split

The Sixth Circuit's conclusion that an alien whose appeal was denied after the attorney's disbarred attorney failed to file a brief did not suffer prejudice creates a circuit split. The Markus were unquestionably prejudiced by prior counsels' performance because they lost the right to present their asylum claim to the BIA. The BIA was left to rely on a notice of appeal that was based on issues that were simply not applicable to this case. Because of the attorneys' performance, the Markus lost the right to administrative appellate and judicial review.

Other circuits addressing the issue of ineffective assistance of counsel have presumed that an alien suffers prejudice when counsel's deficient performance completely deprives the alien of the ability to present his case. In Granados-Oseguera v. Gonzales, the Ninth Circuit found that counsel's mistakes were prejudicial where it cost the alien his right to seek judicial review or file a timely motion to reopen. 464 F.3d 993, 998-99 (9th Cir. 2006). The Ninth Circuit only required the alien to show a "plausible" basis for relief. Id. at 999. The Sixth Circuit, however, applied a "but for" test, something that is almost impossible to

satisfy, especially where counsel's deficient performance leaves the record incomplete.

In Singh, as in this case, the BIA dismissed an alien's appeal after an attorney failed to file a brief. Singh v. Ashcroft, 367 F.3d 1182, 1186-87 (9th Cir. 2004). "Counsel's failure to file a timely brief deprived Singh of any meaningful review of the IJ's decision. A presumption of prejudice is thus warranted here." Id. at 1189. To require an alien in this situation to prove that he would have won his case places too high a burden on the alien. Id. The alien only has to show "that the BIA could *plausibly* have determined" he was eligible for asylum. Id.

The BIA was well aware of Ms. Yaeger's deficient performance because it expelled her from practicing before the IJ and BIA during the course of the Markus' administrative appeal. The Second Circuit, when faced with a similar situation, remanded to the BIA because the BIA failed to address the disbarment of an attorney. Yang v. Gonzales, 478 F.3d 133, 143 (2d Cir. 2007). The court was "critical" of the BIA's failure to address the IJ's denial of asylum in light of a subsequent disbarment of the attorney who represented the applicant. Id.; see also Mai v. Gonzales, 473 F.3d 162, 165 n.1 (5th Cir. 2006) (criticizing

the BIA for failing to address how an attorney's mistakes effected the outcome of the proceeding).

Asylum applicants are among the most vulnerable of immigrants and are accorded special protections by Congress. The BIA has acknowledged this and has placed a duty on the IJ to help asylum applicants put forth their claims. Matter of Y-L-, 24 I. & N. Dec. 151, 161-62 (BIA 2007). The BIA knew of Ms. Yaeger's deficient performance and also knew that the Markus were unaware of her errors and her disbarment. The BIA should have given the Markus an opportunity to brief the merits of their asylum claim, which would have entitled them to a more favorable standard of review, as opposed to considering their claim through a motion to reopen, which the BIA retained the discretion to deny even if they established their eligibility for relief. Siong v. INS, 376 F.3d 1030, 1038 (9th Cir. 2004). Due process requires that an alien have a right to a direct administrative appeal of the IJ's decision. U.S. v. Paredes-Batista, 140 F.3d 367, 377 (2d Cir. 1997). This is not a hollow right that is satisfied by form without substance.

CONCLUSION

Petitioners respectfully submit that the Sixth Circuit erred in the following respects:

- The court deprived Petitioners of full and fair consideration of their asylum claim where the ineffective assistance of their previous counsel prevented them from pursuing administrative or judicial appeals.

Therefore, Petitioners respectfully pray that the Court grant their petition for writ of certiorari and reverse the decisions of the Sixth Circuit Court of Appeals and the BIA.

Respectfully Submitted,

_____

Marshal E. Hyman

Counsel of Record

Russell Reid Abrutyn

APPENDIX

6TH CIRCUIT:

Order Denying Petition for Rehearing,
filed 02/15/07 ..... A1 - A2

Opinion,
filed 10/05/06 ..... B1 - B19

BOARD OF IMMIGRATION APPEALS:

Decision of the Board of
Immigration Appeals [A75-313-860],
filed 07/25/05 ..... C1 - C5

Decision of the Board of
Immigration Appeals [A75-313-860],
filed 12/11/03 ..... D1 - D7

Oral Decision and Order
Immigration Judge,
filed 11/25/98 ..... E1 - E19

No. 05-3953

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTON M. MARKU, AT AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	**ORDER**
	)	
ALBERTO R. GONZALES, ATTORNEY GENERAL	)	FILED February 15, 2007 Leonard Green, Clerk
	)	
Respondent.	)	

BEFORE: ROGERS and GRIFFIN, Circuit Judge; and HOOD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. Joseph M. Hood, Chief United States District Judge for the Eastern District of Kentucky, sitting by designations.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

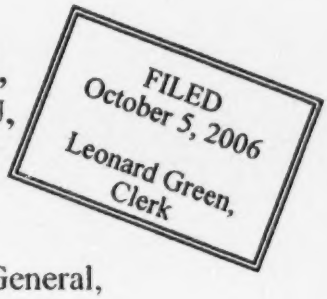
No. 05-3953

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ANTON M. MARKU, ROZE MARKU, ELDE MARKU, and ARETA MARKU,
Petitioners- Appellants,

v.

ALBERTO R. GONZALES, Attorney General,
Respondent-Appellee.



ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BEFORE: ROGERS and GRIFFIN, Circuit Judges; HOOD, District Judge.*

ROGERS, Circuit Judge. Anton and Roze Marku, and their children Elde and Areta, are all native Albanians who petition this court for review of denial by the Board of

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*The Honorable Joseph M. Hood, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

Immigration Appeals of their motion to reopen deportation proceedings based on a claim of ineffective assistance of counsel. Because Marku has failed to connect the failures of prior counsel to the outcome of his case, he has not established the prejudice required for a successful motion to reopen based on ineffective assistance of counsel. We deny the petition for review.

I. Background

Anton and Roze Marku entered the United States without inspection on September 11, 1996, and their children, Elde and Areta, entered the United States on September 29, 1996. In May 1997, Anton Marku, through counsel, filed an application for asylum and withholding of removal with his wife and children as derivative applicants. In his asylum application, Marku alleged persecution based on his political opinions and membership in a particular social group.

In July 1997, the Markus received Notices to Appear. Anton and Roze Marku were charged with violating § 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) (being removable as aliens admitted without being admitted or paroled). 8 U.S.C. § 1182(a)(6)(A)(i). Elde and Areta

Marku were charged with violating § 237(a)(1)(A) of the INA (being removable as aliens admitted without proper documentation at the time of entry). 8 U.S.C. § 1227(a)(1)(A). At a preliminary hearing on September 9, 1997, the Markus conceded removability, renewed their applications for asylum, and applied for withholding of removal and, in the alternative, for voluntary departure.

The merits hearing occurred on November 25, 1998, in Detroit, Michigan. Valerie Lisiecki[2] and Noel Lippman represented the Markus. At the hearing, counsel did not have a copy of Anton Marku's asylum statement and borrowed a copy from the INS attorney. It also became apparent that the immigration judge (IJ) did not have Anton Marku's supplemental asylum statement which was prepared because the statement attached to his initial application was incomplete. The IJ sustained the government's objection to consideration of the supplemental statement because the statement was not submitted to the IJ in a timely fashion. However, the IJ stated that nothing prevented Marku from

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[2]Petitioners' briefs refer to Lisiecki as Ms. Yaeger. At some point after the merits hearing she apparently began using her maiden name.

testifying to what was in the supplemental statement and that the statement would be admissible in the event that the government raised allegations of recent fabrication. Finally, the IJ allowed Marku to make corrections to the statement included with his asylum application because Marku said it was incomplete. After the changes in the asylum statement were read to the IJ, Lisiecki left the hearing to attend to another client, leaving Lippman to represent the Markus at the hearing. The IJ asked Marku whether it was a problem if Lisiecki left and Marku responded that it was not.

Following the hearing, the IJ denied Marku's application for asylum. Although the IJ found Marku to be credible, the IJ concluded that Marku had not established past persecution and, relying on the changes in the government of Albania since the Markus left and the State Department country report, also concluded that Marku had not established fear of future persecution. The IJ, relying again on the State Department report, stated that the Albanian economy in 1996 was "virtually collapsed" and that it was not difficult to believe why someone desirous of a better life would want to leave. Because Marku could not establish the lower burden of proof required for asylum claims, the IJ concluded that Marku

could not establish entitlement to withholding of removal. The IJ also found Marku ineligible for voluntary departure because he was in the country for less than one year.

Marku appealed the IJ's decision to the Board of Immigration Appeals (BIA). The notice of appeal listed seven errors on the part of the IJ, including denial of Marku's application for asylum. Although Lisiecki indicated that she would file a brief, she failed to do so, and the INS moved for summary dismissal. The BIA dismissed the appeal on December 11, 2003. Rather than summarily dismissing the appeal, the BIA stated in its opinion that Marku failed to establish entitlement to asylum. The BIA agreed with the IJ that Marku's primary reasons for leaving Albania were the faltering economy and Anton Marku's implication in criminal activity.

The State of Michigan suspended Lisiecki from the practice of law on December 20, 2000, and the BIA suspended her from practicing before the agency on April 9, 2001. The BIA sent suspended attorney notices and briefing schedules to Marku in April, May, June, and July of 2003, but these were returned as undeliverable, presumably because Marku had moved and the notices were sent to his old

address. Marku maintains that it was not until he went to Lisiecki's office in November 2003 that he discovered that Lisiecki had moved from the state. When Marku went to Lisiecki's office, Lippman told Marku that Lippman was handling the appeal to the BIA, but did not tell Marku about Lisiecki's suspensions. Marku states that he gave Lippman his new address at this November 2003 meeting, but the December 11, 2003 decision of the BIA was also returned as undeliverable. Marku claims that he attempted to contact Lippman a number of times in 2003 and 2004 to check the status of his case but that Lippman never responded. It was not until January 2005, when the Markus' daughters were sent notices to appear for their removal, that Marku became aware of the BIA's decision. Marku contacted another attorney, who notified him of the BIA's 2003 decision and filed with the BIA a motion to reopen.

The BIA denied the motion on July 25,2005, ruling that the motion was untimely given that it was not filed within 90 days of the BIA's December 2003 dismissal of Marku's appeal. The BIA also held that even were the ninety-day period to be equitably tolled, Marku did not establish that reopening was warranted because he failed to establish "the

requisite prejudice stemming from . . . former counsels' actions or inactions." The BIA stated that Marku failed to "allege[] specific errors in . . . prior counsels' presentation and development of the[] asylum claim before the Immigration Judge or the Board that would have affected the outcome of the[] case."

Marku timely filed a petition for review with this court.

II. Analysis

This court reviews the BIA's denial of a motion to reopen for abuse of discretion. *Sako v. Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006). When "determining whether the Board abused its discretion, this Court must decide whether the denial of [the] motion to reopen . . . was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." *Allabani v. Gonzales*, 402 F.3d 668, 675 (6th Cir. 2005) (quoting *Balani v. INS*, 669 F.2d 1157, 1161 (6th Cir. 1982)). Generally, motions to reopen, especially in deportation proceedings, are

disfavored, and the BIA has broad discretion to deny such motions. *INS v. Doherty,* 502 U.S. 314, 323 (1992).

The BIA did not abuse its discretion in denying the motion to reopen. Because Marku cannot show that the actions or inactions of former counsel prejudiced him, his claim of ineffective assistance of counsel fails.[3] Marku must establish "that ineffective assistance of counsel prejudiced him or denied him fundamental fairness in order to prove that he has suffered a denial of due process." *Huicochea-Gomez v. INS*, 237 F.3d 696,699 (6th Cir. 2001). "'Prejudice' inquires, *ex post*, whether due process was violated by evaluating whether the alien's claims could have supported a different outcome. 'Fundamental fairness' examines the

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[3]Marku has met the procedural requirements for an ineffective assistance of counsel claim as laid out in *In re Lozada,* 19 I. & N. Dec. 637 (B.I.A. 1998). *Lozada's* requirements are (1) that a motion to reopen based on ineffective assistance of counsel be supported by an affidavit detailing counsel's failings; (2) that counsel be informed of the allegations; and (3) that the motion shows that disciplinary charges have been filed with the appropriate authority. 19 I. & N. Dec. at 639; *Sako*, 434 F.3d at 863. A review of the record shows that Marku met these requirements; theBIA so stated and the government does not dispute Marku's compliance with the *Lozada* requirements.

process afforded *ex ante*, considering whether the denial of effective counsel makes such a proceeding fundamentally unfair." *Sako*, 434 F.3d at 864. Prejudice in this context requires that Marku establish that he is entitled to the underlying relief requested. *Id.* at 865; *Ljucovic v. Gonzales*, 144 Fed. Appx. 500,503 (6th Cir. 2005) (unpublished). Specifically, he must show that, but for the errors made by prior counsel, he would be entitled to remain in the United States. *Sako*, 434 F.3d at 864.

The specific complaints that form the basis for the ineffective assistance of counsel claim are: (1) that counsel came to the merits hearing unprepared because they did not have a copy of Marku's asylum application and had to share the copy brought by the INS attorney; (2) that Lisiecki's office incorrectly translated Anton Marku's initial asylum statement; (3) that Lisiecki failed to file Anton Marku's supplemental asylum statement; (4) that counsel failed to keep Marku informed of the status of the appeal of the IJ's decision; (5) that counsel failed to inform the INS of Marku's new mailing address; (6) that counsel failed to inform Marku of the BIA's decision; and (7) that Lisiecki failed to file a brief with the BIA in Marku's appeal of the IJ's decision.

Marku alleges in his brief that prior counsel's deficient performance prejudiced him in the following ways: (1) Marku lost the right to a full and fair administrative consideration of his asylum application; (2) Marku lost the opportunity to pursue a humanitarian asylum claim; (3) Marku lost the opportunity to seek judicial review of the BIA's decision; (4) the Markus became subject to an administratively final order of removal; and (5) the Markus are inadmissible for ten years.

In its denial of Marku's motion to reopen, the BIA noted that Marku failed to "allege[] specific errors in the prior counsels' presentation and development of the[] asylum claim before the Immigration Judge or the Board that would have affected the outcome of the[] case." Marku's brief to this court also fails to specify how the alleged errors of prior counsel prejudiced him. Although his brief offers a litany of errors made by prior counsel and associated harms, it fails to construct any arguments with the relevant prejudice standard in mind and Marku has not shown that but for the errors committed, he would be entitled to remain in the United States.

A. Failure to file a brief

Marku claims that prior counsel's failure to file a brief in the appeal to the BIA prejudiced him because he was unable to demonstrate eligibility for asylum and because he was unable to pursue a claim for humanitarian asylum based on "other serious harm" under 8 C.F.R. § 1208.13(b)(l)(iii)(B). The government maintains that this court lacks jurisdiction to consider Marku's claim regarding humanitarian asylum because it was not raised before the BIA. This court does not review claims that were not presented to the BIA. *Ramani v. Ashcroft*, 378 F.3d 554, 560 (6th Cir. 2004). The only allegation in the motion to reopen that can be construed as addressing the failure to file a brief is that prior counsel "did not diligently pursue [the Markus'] applications." However, Marku raised the issue in his Second Emergency Motion for Immediate Stay of Removal, which was filed on May 26, 2005, approximately two months before the BIA denied the motion to reopen. In its denial of the motion to reopen, the BIA stated that the notice of appeal included a detailed attachment providing the reasons for the appeal to the BIA and that these reasons were considered by the BIA in the original appeal. This statement by the BIA supports Marku's

contention that this court has jurisdiction over the claim regarding the failure to file a brief because it is apparent that the BIA considered this claim of error by prior counsel and rejected it. Thus, this court has jurisdiction to consider the issue.

Regarding the claim of prejudice stemming from the loss of an opportunity to demonstrate his eligibility for asylum, Marku cannot establish that the failure to file a brief in the appeal of the IJ's decision to the BIA resulted in prejudice. Although the government moved for summary dismissal for failure to file a brief, the BIA considered Marku's grounds for appeal and agreed with the IJ's determinations on the merits, and Marku has not established that the outcome of the appeal to the BIA would have been different had a brief been filed. *See Ba v. Gonzales*, No. 04-3759, 2006 U.S. App. LEXIS 13694, at *3 (6th Cir. May 31, 2006) (unpublished). Marku has not provided this court with any argument supporting his contention that he would have prevailed in his BIA appeal had a brief been filed. His brief recites the substance of his testimony at the merits hearing and states that the IJ erred but otherwise offers no illustration of how a brief would have altered the outcome of

his appeal. *See Dokic v. INS*, No. 92-3592,1993 U.S. App. LEXIS 19027, at *10 (6th Cir. July 15,1993) (unpublished) (rejecting a claim of prejudice based on failure to file a brief where the failure "did not prevent the Board from specifically addressing and rejecting each basis for the appeal"). Because of this failure to link the error in failing to file a brief with the BIA with the required prejudice, Marku has not established that this error prejudiced him.

Similarly, because Marku cannot establish prejudice stemming from the failure to file a brief raising the issue of humanitarian asylum based on "other serious harm" under 8 C.F.R. § 1208. 13(b)(1)(iii)(B), this claim fails. Marku has not alleged that, but for his previous attorneys' failure to file a brief, he would have been *granted* humanitarian asylum. In the Second Emergency Motion, the only argument Marku presented to the BIA in support of his claim of eligibility for asylum based on other serious harm was that "Albania is a violent and dangerous place where crime, corruption, and the settling of old scores . . . occur unabated and often with government acquiescence," and that Marku was prevented from presenting this claim. However, such general statements regarding conditions in Albania that impact all Albanians are

not sufficient to show what specific harms may be faced by the Markus upon their return to Albania. *See Pergega-Gjonaj v. Gonzales*, 128 Fed. Appx. 507, 512-13 (6th Cir. 2005) (unpublished) (holding that the IJ and BIA properly rejected an asylum claim based on other serious harm where the petitioner offered only general evidence that life in Kosovo was difficult and that there were a lot of problems there).

Because Marku cannot establish that he and his family would have been entitled to remain in the United States had prior counsel filed a brief in the appeal to the BIA, he cannot establish the prejudice necessary to sustain a claim of ineffective assistance of counsel. Prior counsel failed to file a brief with the BIA and Marku no doubt lost an opportunity to present his appeal to the BIA in a more forceful and articulate way, but he has not alleged or provided support for a contention that he would have been successful. Thus, this claim must fail.

B. The loss of the right to appeal the BIA's decision

Because he cannot show that an appeal to this court would have been successful, Marku cannot establish that he was prejudiced when, because of his previous attorneys'

failure to notify the BIA of Marku's new address and their failure to notify him of the decision of the BIA, he was foreclosed from appealing the decision of the BIA to this court. *Ljucovic*, 144 Fed. Appx. at 504-05 ("[T]he loss of a right to appeal the BIA' s decision to this court . . . do[es] not constitute prejudice under this circuit's law . . . . [The petitioner] must establish that but for [counsel's] failure to notify her of the BIA's decision, she 'would have been entitled to continue residing in the United States.'" (quoting *Huicochea-Gomez*, 237 F.3d at 699-700)). Marku's brief devotes one paragraph to this claim of prejudice and fails to establish that he would have been successful on appeal. The IJ concluded that Marku had not established past persecution, that the Markus left when they did because of a criminal incident and the faltering Albanian economy, and that changed circumstances in Albania, specifically changes in the government, meant that the people targeting Anton Marku and his family were no longer in power, thus negating any presumption of well- founded fear of future persecution. The BIA agreed with the IJ's determination in the initial appeal. Marku has not introduced any evidence or made any argument suggesting how or why the outcome of his case would have

been different after a substantial evidence review. *See id.* at 505. Marku merely restates the substance of his asylum claim and provides an overview of asylum law. Because the loss of the right to appeal, standing alone, is insufficient to show prejudice, Marku's claim based on this loss fails.

C. The accrual of unlawful presence and the ten-year ban on readmission

Marku claims that his attorneys' failure to notify him of the BIA's decision prejudiced him because he and his family accrued of more than one year of unlawful presence, triggering a ten-year ban on readmission. The government maintains that Marku did not exhaust this claim and that this court lacks jurisdiction. Marku's motion to reopen only mentions the accrual of unlawful presence and does not mention the ten-year ban on readmission. However, the Second Emergency Motion discusses the ten-year ban on readmission triggered by the Markus' accrual of more than one year of unlawful presence. As discussed previously, the BIA considered the substance of this issue when denying the motion to reopen and concluded that Marku failed to demonstrate the requisite prejudice-that the outcome of his case would have been different. Because this explanation

disposes of the ineffective assistance of counsel argument and because the BIA apparently considered the Second Emergency Motion and the arguments contained therein, it appears that Marku exhausted his claim regarding the ten-year ban on reentry.

However, this claim fails because Marku cannot establish the requisite prejudice. Marku claims that his previous attorneys' failure to notify the BIA of his new address and to notify him of the BIA's decision resulted in more than one year of unlawful presence in the country, triggering a ten-year ban on readmission. However, the prejudice inquiry in the context of ineffective assistance of counsel focuses on the effect of any errors on Marku's right to remain in the United States and on the fundamental fairness of the procedures. Under such a prejudice standard, Marku cannot establish that the impact of his previous attorneys' errors-- the accrual of unlawful presence and a ten-year ban on readmission--is sufficient. Although it is no doubt prejudice in the general sense of the word, it is not sufficient to support a claim of ineffective assistance of counsel in the context of immigration proceedings. *See, e.g., Ljucovic*, 144 Fed. Appx. at 505 ("[T]he . . . accrual of unlawful presence

do[es] not constitute prejudice under this circuit's law . . . . [The petitioner] must establish that but for [counsel's] failure to notify her of the BIA's decision, she 'would have been entitled to continue residing in the United States.'" (quoting *Huicochea-Gomez*, 237 F.3d at 699-700)); *Miculi v. Ashcroft*, 96 Fed. Appx. 338, 340 (6th Cir. 2004) (unpublished) (rejecting a claim of prejudice where petitioner accumulated unlawful presence and was subject to penalties on her ability to return).

D. Errors committed at the merits hearing

Finally, Marku cannot establish that any of the enumerated errors committed by prior counsel at the merits hearing deprived him of a full and fair administrative determination of his asylum application. He has not shown how these errors had an impact on the outcome of his case and thus he cannot show prejudice. He does not point to a failure to introduce or develop evidence at the merits hearing but merely states that the IJ erred as a matter of law in denying his asylum application and that if his attorneys had been effective, he would have established that he suffered past persecution and had a well-founded fear of future persecution.

Because he has not articulated how the errors committed by prior counsel at the merits hearing prevented the Markus from receiving a full and fair hearing, he cannot establish that his attorneys' performance, sloppy though it may have been, prejudiced him in the outcome of the merits hearing.

III. Conclusion

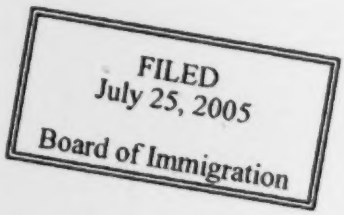
Although prior counsel in this case made errors, were unprofessional in their handling of the case, and failed to take important steps to protect their clients, failures which have harmed the Markus, there is no showing of the requisite prejudice. Thus, the BIA did not abuse its discretion in denying Marku's motion to reopen. For the foregoing reasons, the petition for review is denied.

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Hyman, Marshal E., Esquire
3250 West Big Beaver
Suite 529
Troy, MI 48084-2902



Office of the District Counsel/DE
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: MARKU, ANTON A75-313-860
RIDERS: 72-413-622 72-413623 72-313-861

Date of this notice:
07/25/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Frank Krider
Frank Krider
Chief Clerk

Enclosure
Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board
Immigration Appeals

Falls Church, Virginia 22041

File: A75 313 860 - Detroit
A75 313 861
A72 413 622
A72 413 623

Date: Jul. 25, 2005

In re: ANTON M. MARKU
ROZE MARKU
ELDE MARKU
ARETA MARKU

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Marshal E. Hyman, Esquire

ON BEHALF OF DHS:
Kathleen L. Alcorn, Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present with being admitted or paroled (A75 313 860, A75-313-861)

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time

of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document (A72 413 622 , A72 413 623)

APPLICATION: Reopening

ORDER:

PER CURIAM. This matter was last before us on December 11, 2003, when we dismissed the respondents' appeal of the Immigration Judge's denial of their applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act and denied the respondent's motion to remand for protection under the Convention Against Torture. On March 7, 2005, the respondents filed a motion to reopen, based upon ineffective assistance of their prior counsels. The respondents maintain that their prior counsels failed to diligently pursue their applications for relief, keep them informed of developments in their case, or provide them with a copy of their immigration file. The respondents' motion will be denied.

As an initial matter, we note that the respondents' motion to reopen is untimely, inasmuch as it was not

submitted within 90 days of the Board's December 11, 2003, final administrative order. See 8 C.F.R. § 1003.2(c). However, even if we found that the deadline for filing the motion to reopen should be equitably tolled, we find that the respondents have failed to establish that reopening is warranted in this matter. Notwithstanding the respondents' satisfaction of the procedural requirements for demonstrating ineffective assistance of counsel, we find that the respondents have failed to demonstrate the requisite prejudice stemming from their former counsels' actions or inactions. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). The term "prejudice,"refers to actual prejudice. *See Matter of Assaad, supra.*

While we recognize that one of the respondents' prior counsels was suspended from practice, the respondents have failed to establish that they would or might have been granted relief from removal had their prior counsels more diligently pursued their applications or kept them informed of developments in their case. In fact, we note that the respondents have not even alleged specific errors in their prior counsels' presentation and development of their asylum claim before the Immigration Judge or the Board that would have affected the outcome of their case.

Moreover, the record reflects that the respondents' prior counsel submitted a detailed attachment to the Notice of Appeal (Form EOIR-26) providing the reasons for the respondents' appeal, which was considered by the Board in reviewing the merits of the respondents' appeal. Inasmuch as the respondents have failed to establish prejudice stemming from their prior counsels' actions or inactions, we find that the respondents have failed to establish ineffective assistance of their fonner counsels. Accordingly, the respondents' motion to reopen is denied.

/s/ Roger Pauley

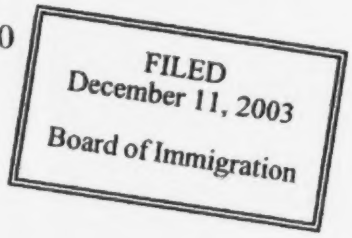
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

MARKU, ANTON
8312 18 MILE ROAD #104
STERLING HEIGHT, MI 48313-0000



Office of the District Counsel/DE
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: MARKU, ANTON A75-313-860
RIDERS: 72-413-622 72-413623 72-313-861

Date of this notice:
12/11/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Jeffrey Fratter
Jeffrey Fratter
Chief Clerk

Enclosure
Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Valerie L. Yeager
38850 Van Dyke Ave.
Sterling Height, MI 48312

Office of the District Counsel/DE
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: MARKU, ANTON A75-313-860
RIDERS: 72-413-622 72-413623 72-313-861

Date of this notice:
12/11/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Jeffrey Fratter
Jeffrey Fratter
Chief Clerk

Enclosure
Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
Immigration Appeals

Falls Church, Virginia 22041

File: A75 313 860 - Detroit
A75 313 861
A72 413 622
A72 413 623

Date: Dec. 11, 2003

In re: ANTON M. MARKU
ROZA MARKU
ELDE MARKU
ARETA MARKU

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
Pro se[1]

ON BEHALF OF DHS:
James R. McLaughlin, Associate Chief Counsel

CHARGE:

---

[1]We note that Valerie L. Yaeger-Lisiecki, the attorney of record in this case, has been suspended from practice before the Board. As this attorney is not permitted to practice law before the Board at this time, this order is being sent directly to the respondents, and a copy only is being sent to Valerie L. Yaeger-Lisiecki.

Notice: Sec. 212(a)(6)(A)i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present with being admitted or paroled (all respondents)

APPLICATION: Asylum, withholding of removal, voluntary departure, reopening for relief under Convention Against Torture.

ORDER:

PER CURIAM. The respondents' appeal is dismissed. The Immigration Judge considered all relevant factors and properly denied the respondents' application for asylum and withholding of removal under sections 208 and 241 (b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231 (b)(3), as well as the privilege of voluntary departure, in his decision dated November 25, 1998, and correctly concludes that the respondents failed to establish that they suffered past persecution, have a well-founded fear of future persecution, or that their life or freedom would be threatened because of their race, religion, nationality, membership in a particular social group, or political opinion, if returned to Albania. *See* sections 208(a) and 241(b)(3) of the Immigration and Nationality Act. As noted by the Immigration Judge, the triggering event that prompted the adult male respondent

and his family to leave Albania in 1996 wad due to his implication in a criminal act and, most likely, the faltering Albanian economy, and not due to any political opinion, expressed or implied (I.J. at 12-13). The Immigration Judge's decision fully explains the basis of his determination that the respondents failed to satisfy the burden of proof of proof for either asylum or withholding of removal (I.J. at 12-15). We agree, and find that the Immigration Judge's decision is proper under the standards set forth in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); INS v. Stevic, 467 U.S. 407 (1984); see also Matter of T-M-B-21 I&N (Dec. 775 (BIA 1997); Matter of H-, 21 I&N Dec. 337 (BIA 1996); Matter of S-P-, 21 I&N Dec. 486 (BIA 1996) (an asylum applicant must demonstrate that harm has been or would be inflicted on account of one of the protected grounds specified in the "refugee" definition); 8 C.F.R. § 1208.13.

While the respondents' appeal was pending at the Board, the respondents filed a motion to remand for further proceedings to apply for relief from removal and deportation pursuant to the Convention Against Torture. The motion win be denied.

The regulations provide that any alien subject to a final order of removal and deportation may file a motion to reopen before this Board to apply for protection under Article 3 of the Convention Against Torture. 8 C.F.R. § 1208.18(b)(2). However, the regulations require that a motion to request relief under the Convention Against Torture will not be granted unless "the evidence sought to be offered establishes a *prima facie* case that the applicant's deportation must be withheld or deferred under 8 C.F.R §§ 1208.16(c) or 1208.17(a)." 8 C.F.R. § 1208.18(b)(2)(ii). The burden of proof in such an application rests with the applicants. 8 C.F.R. § 1208.16(c)(2).

We find that the respondents here have failed to present a *prima facie* case that "it is more likely than not that [they] . . . would be tortured" if they were to return to Albania. *See* 8 C.F.R. § 1208.16(c). In motions to remand or reopen proceedings, the respondent bears a "heavy burden" in showing such action is warranted. *INS v. Abudu*, 485 U.S. 94, 110 (1988); *Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992). We find that the respondents have failed to set forth a *prima facie* case pursuant to 8 C.F.R §§ 1208. 16(c) and 1208.18(b)(l). Accordingly, their motion to remand will therefore be denied .

FURTHER ORDER: The motion to remand for further proceedings to apply for relief from removal and deportation pursuant to the Convention Against Torture is denied.

/s/ Roger Pauley

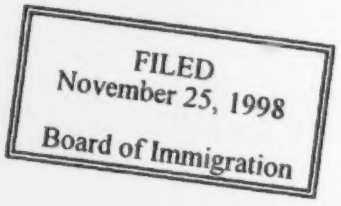
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Detroit, Michigan

File No.: A 75 313 860
75 313 861
75 413 662
75 413 663

November 25, 1998

In the Matter of)
) IN REMOVAL PROCEEDINGS
MARKU, ANTON)
MARKU, ROZA)
MARKU, ELDE)
MARKU, ARETA)
Respondents)



CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, present without being admitted or paroled

Section 237(a)(1)(A) of the Immigration and Nationality Act, failing to possess valid entry or immigrant visa, border crossing card or other valid entry document

APPLICATIONS: Asylum, withholding of deportation, voluntary departure

ON BEHALF OF RESPONDENT:
Noel L. Lippman, Esquire

ON BEHALF OF DHS:
James McLaughlin, Esquire
Assistant District Counsel

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

The respondent is a 39-year old married male, native and citizen of Albania. The co-respondents in this case are his spouse and two children. The United States Immigration and Naturalization Service brought these proceedings pursuant to the authority contained in the Immigration and Nationality Act. Proceedings were commenced with the filing of the Notice to Appear with the Immigration Court on July 23, 1991. The Notice to Appear is Exhibit 1. Exhibits 1-A, 1-B and 1-C are the subsequent Notices to Appear on the co-respondents. The respondents Anton and Roza admitted they are not citizens or nationals of the United States, that they are natives of Albania and citizens of Albania. They entered the United States through San Ysidro, California, on September 11, 1996, at which time they were not admitted and paroled after inspection. They further conceded they were removable under 212 (a)(6)(A)(i) as being present without

being admitted and paroled. The respondents Elde and Areta admitted that they were not citizens or nationals of the United States, but natives of Albania and citizens of Albania and that they were admitted into the United States on or about November 29, 1996. They further admitted that at which time they did not possess a valid visa, permit, border crossing card, identification card or other valid entry; document as required by the Act. They further conceded they were removable under 237(a)(1)(i) of the Immigration and Nationality Act.

Based on the admissions of the respondents, the Court does find that the evidence is clear and convincing that they are removable.

The respondents all declined to designate a country for deportation. Albania is directed.

The lead respondents Anton Marku, applied for relief from deportation in the form of asylum, listed as derivative of his application, his wife and two children. His application for asylum shall as well be considered as an application for withholding of deportation. In the alternative they requested voluntary departure.

Respondent's I-589 application for asylum is included in the record, marked in this case as Exhibit 3. And prior to

admission of the application, respondent swore to me that to the best of his knowledge and belief the information contained therein was correct. He was given an opportunity to make corrections to that statement that was appended to his application.

The application was forwarded to the State Department for a response (Exhibit 4). However, response was not received from the State Department. However, in the evidence submitted by the Government, the County Reports and Profiles for Albania for the last years were admitted and considered.

Facts

The evidence in the hearing consisted of his own testimony, the supplemental declaration attached to his asylum application, the County Report and Profiles for Albania, the testimony of his spouse, Rosa, the testimony of his cousin, Mr. Marku, whose testimony was offered by stipulation. Based on his written application, respondent indicated he was seeking asylum on the grounds of membership in a particular social group or political opinion.

He believes if he returned to Albania he would be killed. He did indicate in the application as well that neither him nor his family members had been arrested, detained, interrogated, convicted and sentenced.

In 1996 he departed Albania. He entered Yugoslavia where he remained approximately a month. He traveled then to Mexico where he remained approximately a few days and then entered the United States. His two children followed months later. Their entries in each of their respective cases prompted these proceedings as alleged in the charges above.

Now the respondent testified substantially as follows relative to his asylum application: that he was born in Albania in 1959, and that he comes from a family that he considers to be persecuted by the communist regime. He has highlighted the fact that his grandfather, who was adamantly against agrarian land reform, that was being implemented by the communists, was sentenced to a period of life in prison during which he passed away. He indicated his father as well who was an anti-communist, had himself been arrested by the communists and sentenced to a period of ten years. He indicated that the family land that belonged to the family had been confiscated by the communists and that his family had

been called by the term kulaks, a pejorative term. The respondent managed to finish high school, but he was not allowed to go further because of his status. He was, however, drafted into the army, but while in the army, he was not allowed to carry a weapon again because of his status. He was, in his desire to get married, limited as to who he could marry, and a marriage was arranged with a woman from another persecuted family, and in 1984 he did marry Roza. In 1989, his mother died from suicide owing to the pressures that had been exerted on the family. He indicated that they were hated by all and that the funeral of his mother only kulaks attended. On one occasion, he believes his falter had been criticizing the qualify of the bread and as well the quality of the government and in particular indicated that he was not allowed to even go visit his sister, who was in Yugoslavia. This apparently was said publicly. Four days after this incident while he was walking, he was struck by a police vehicle and later died. Witnesses to this incident described the vehicle as a police jeep. Respondent in this case was concerned about the matter and he went to the police station in Shkoder to investigate and determine what had happened to his father. And while in the police station he, himself, was

placed in an interrogation room. He was beaten. He was kicked. He was cuffed. As a result of which, however, no one else was charged with the incident and he, however, was released. Later on in 1991, he had been persuaded to attend a demonstration for the toppling of the statues of either Enver Hoxha or Stalin, which he did, and when he arrived at the demonstration, he. noticed' that there was a rope attached to one of the statues and he assisted some of the individuals in toppling the statue. There were approximately 2,000 people in attendance at this demonstration, but he at the end of the demonstration he went home only to find out that the police later came to his home and arrested him. Was placed in incarceration from January 4 to January 12, 1991. During this period of incarceration, he was shown a video of his activity while at that demonstration. During this period of incarceration, he was beaten, a couple teeth were broken, and he displayed a cut on his forehead which appeared approximately about an inch in length. It appeared to be the consequence he believes of a blow administered to his forehead. He did indicate that there were some scars as well on his feet, but he did not display them. He did further indicate that there were no permanent injuries from this

incident other than the scaring. He was subsequently released as I indicated on January 12th, and sometime in 1991 he decided to join the Democratic Party, believing this to be the better form of government now that the communist regime was toppling. Sometime during this year he also took part in a demonstration in protest of an election that he believed was fraudulent and because of that participation at that demonstration he feared that again he would be incarcerated and possibly beaten. So on April 6th of '91 he fled to Yugoslavia with his wife and child. While in Yugoslavia, however, he was captured. He was detained briefly and returned back to Albania where he was detained for four days, after which he was released. He described that there were 80 others involved in this exchange of personnel. He believes he was not detected or subject to any punishment because he had used a different name. As time progressed, he became disappointed with the Democratic Party and in 1993 he joined the Democratic Christian Party. The difference he indicates for the shift was that the Democratic Christian Party supported the return of the land while the Democratic Party appears to have been staling in their promises that were made prior to the election.

In fact in October of '94, the Democratic Party that was in power was in fact implementing their own land redistribution program and when they came upon the land that respondent believed was his, they decide to redistribute the land in a manner that he felt was improper, and they left him with very little of his family land. Because of his protests he was arrested, taken to a police station and beaten and as a consequence of that beating, however, he was forced to sign and he did sign an agreement agreeing to that land distribution program and again was released. Sometime later, he indicated that a draft provision was being circulated that he believes would have made the president a virtual king. And this matter was put forward as a referendum for the people to vote on. On May 26th of '96 the elections were held on that referendum. He as a member of the commission observing these elections decided a few hours into the election that it was fraudulent and decided to boycott it and walked out. He indicates he received threats after this election threatening to kidnap his children because of his actions. Now in June 8 of 1991, he had planned a trip to Shkoder to buy some food that was unavailable in his small town. So approximately 6:00 a.m. that morning he departed from his house where he went

to the bus depot to await a bus for the trip. While at the bus station, a friend, a person he describes as a friend that he's known for a long time came by in a car and offered him a ride to Shkoder. He indicated that he would be able to pay him something for this and the friend apparently accepted, so he got in the car. But as he was doing so, he was told that there was another individual to be riding and that he then was to get in the back seat, which he did. The car drove further out of town, approximately ten minutes out of town. They pulled over at a side street and allowed another individual who was waiting for them to get in the car. And as he got in the car, respondent indicated that this individual turned out to be the head of the Democratic Party of that region. They continued on to Shkoder. About another ten minutes further into the trip virtually into the town and they came upon a police roadblock. The police were pulling them over, about to search the vehicle when respondent indicated that the head of the Democratic Party got out of his seat, went up and appeared to say something to the police. He believed the gentleman told the police that there was a weapon in the car. The consequence of that was there was a search conducted and a weapon, a pistol was in fact found under respondent's seat.

He was charged wi th illegal possession of a firearm and sentenced to 45 days and had to serve $1,000 fine. He believes he was set up by someone who utilized this friend and this Democratic Party head to get back at him because of hie political views or anti-communist views. After his release, he decided at that time to leave Albania. He indicated that there were terrorist bands roaming the country. So he first went to Yugoslavia. With the assistance of his aunt, was able to obtain passports and money for his wife and children to follow, which they did, traveling to Mexico and then subsequently into the United States, which prompted these proceedings.

Statement of the Law

The burden is on the respondent to establish that he is eligible for asylum or withholding of deportation.

To qualify for withholding, he needs to show there has been a clear probability his life or freedom would be threatened in the country directed for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. This means respondent's facts

must establish it is more likely than not that he would be subject to persecution on one of the grounds specified.

To qualify for asylum, he needs to show that he is a refugee within the meaning of the Act. The definition of refugee includes the requirement that he has either suffered past persecution or that he has a well-founded fear of future persecution in his country of nationality or last habitual residence on account of his race, religion, nationality, membership in a particular social group or political opinion. The alien must show he has the subjective fear of persecution and that fear has an objective basis. The subjective basis of a well-founded fear of persecution has been described in the regulations as "a reasonable possibility of actually suffering such persecution," if the alien were to return to his home country. The subjective component must be supported by credible, direct and specific evidence in the record. The regulations with regard to past persecution also indicate that an alien who has established past persecution within the meaning of the Act shall be presumed to have as well a well-founded fear of persecution unless there is a preponderance of the evidence established that since the time the persecution occurred, the conditions in the home country

have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. An alien who establishes past persecution but not a well-founded fear of persecution, will be denied asylum unless there are compelling reasons for not returning him, which arise out of the severity of that past persecution.

Credibility

Overall the Court does not have much doubt as to the respondent's veracity. I do believe that he believes that what he is saying is in fact accurate, and I do believe as well from the testimony that the various events objectively indicated by the respondent may have occurred. Where the Court, however, differs, is when we begin to attribute the reasons or the implications of many of these activities. And in particular, I mention as an instance his testimony relevant to the June 1996 incident with the pistol. I find it almost incredible to believe that he had been set up for this. It just seems almost preposterous to believe that his friend would be waiting in a car without knowledge that respondent would ever be at a train station, the bus station to go to Shkoder in need of any ride. All the while requiring another accomplice, the head of

the leader of the Democratic Party of the region to wait many miles away on some street in the hope that the respondent would happen to be by the bus station whereby he could be offered a ride, whereby he could be implicated at holding a pistol and convicted for that instance. It just seems completely improbable. What may have occurred is that he was in fact at the depot, that he was in fact offered the ride. Who these people were it's not clear. And as they traveled to Shkoder when they were approached by the police, the vehicle was searched and there was a gun. He has indicated the gun wasn't his. I have no reason to disbelieve him. But it appears his two friends in the car were unwilling to take the blame, and since the gun was found under his seat, he was implicated. I don't believe there is any motive other than failure to account for one's own criminal act. Certainly this has nothing to do with the fact that he had been an anti-communist or his family was such; he didn't support the Democratic Party; that this passenger may have been a leader of the Democratic Party, etc., I just don't believe any of that has any bearing on what may have occurred that day.

Analysis and Findings

Now even taking the respondent's testimony in the light best I can, I do not find he's established past persecution nor do I find he's established a well-founded fear of future persecution. Persecution is harm or harm threatened on account of a belief or trait held by or imputed to the alien, and that belief or trait must be protected on one of the five grounds; race, religion, nationality, membership in a particular social group or political opinion. The question in many cases, is there a viable theory? As I've indicated, the triggering event that prompted his departure in 1996 does not appear to have anything to do with politics; has nothing to do with his stature. It just merely has to do with his implication in a criminal activity. Now, I believe the State Department reports are replete that during 1996 the economy of Albania can best be described as virtually collapsed, and it's not difficult to believe why someone who desires a better life for himself and his family would want to depart. The question as well as to past persecution. Now the respondent's indicated a long history of being a part of a family that's anti-communist. It was indicated as well that there were two incidents in which he personally was involved with the communists. And in

particular the incident involving the toppling of the statue which resulted in a fairly serious beating. But I believe the real issue in that case is that the communists are no longer in power. These individuals, although they may be the same people, there's no evidence that they're practicing the same theory of government. Now, if they in fact are rampant criminals merely doing criminal activities, that then is unfortunate for that would in itself not be covered by any of the grounds of asylum. So the question we have is who is the persecutor in this case? Well, he claims it's the government, but which government? Is it the communists? Is it the Democratic Party? Who then? And I point as well to the testimony of respondent's spouse, who indicated that since 1990 they have been receiving threats. Well, in 1990, the communists were in power and then apparently they were threatening the children since 1990 as the governments changed. There appeared to be no explanation for this. The Court seriously doubts as to whether there were any threats of the magnitude that reflected any political opinion on their part. Though there may have been some rancor among various groups, it certainly would not amount to any persecution. It is difficult to believe why a copy of any of these letters was not

kept while many of the other documents less important were. And what is the harm that's feared in this case? He fears in essence he would be brought to the police, again beat up or incarcerated or wrongly accused of possessing a weapon. And three, is this belief or immutable characteristic protected? As indicated above, certainly the false implication in a crime without any connection to any political or other basis has no connection to asylum law. So I don't feel that his rejection, if you will, of his false prosecution for possession of a pistol has anything to do with asylum claim. And the question as well, is the persecutor aware or could he become aware of the respondent's belief? Well, it does appear by his own testimony that he did participate in some anticommunist activity and his father did in fact serve some time and his grandfather in fact died in prison. I ask the question, as unfortunate as this, what does this have to do with the events in today's world? There's certainly no evidence that he would be targeted on any basis for this, and I believe the State Department Profile in that regard is quite clear; there is no evidence that people are being targeted.

So overall, even if we were to conclude that the activity by the communists in '90 and '91 can be considered

persecution, which the Court does not believe since it does not find that to be the conduct of a nature severe enough to be considered persecution. But even if we were to assume that, the circumstances have changed about as remarkably as one could possibly ask for in a political setting. The Government of the communists has been toppled. The Democratic Party who took over from Sali Berisba is no longer in power. They were replaced by Fatos Nanos and even he is gone. So the mere claim that these are the same people is without any support, I believe, completely lacks merit. And I believe the connext in another case, is very persuasive: "When aliens try to rebut the State Department with self-serving, unsubstantiated, uncorroborated evidence about current political conditions in the country they left years ago, they will not convince the INS and they will certainly not furnish grounds upon which a reviewing court could reverse the agencies giving the deference we are obliged to give decisions. "Gramatikov y. INS, 128 F.3d 619.

Inasmuch as the Court has found that the respondent's failed to satisfy the lower burden of proof required for asylum, it would necessarily follow that they have failed to

satisfy the higher standard required for withholding of deportation.

Voluntary Departure

The respondents at the master calendar requested voluntary departure in lieu of deportation in the case. To qualify for voluntary departure, they must be able to demonstrate they have one year of physical presence in the United States defined as that period of time between time of entry and time of service of the charging document. And in each of these four cases, that one year has not been satisfied. Therefore, the Court finds they are ineligible for voluntary departure.

ORDERS

IT IS HEREBY ORDERED respondents' applications for asylum, withholding of deportation and voluntary departure be denied.

IT IS FURTHER ORDERED that the respondent's be ordered deported to Albania on the charges contained in the Notices to Appear.

/s/ John F. Walsh
JOHN F. WALSH
Immigration Judge

No. 06-1500

In the Supreme Court of the United States

ANTON M. MARKU ET AL., PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioners' motion to reopen removal proceedings based on a claim of ineffective assistance of counsel.

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In the Supreme Court of the United States

No. 06-1500

ANTON M. MARKU ET AL., PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B19) is not published in the *Federal Reporter* but is reprinted in 200 Fed. Appx. 454. The decision of the Board of Immigration Appeals denying petitioners' motion to reopen (Pet. App. C1-C5) is unreported. The decision of the Board of Immigration Appeals dismissing petitioners' appeal and denying their motion to remand (Pet. App. D1-D7) is unreported. The decision of the immigration judge (Pet. App. E1-E19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. A petition for rehearing was denied on February 15, 2007 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 9, 2007. The jurisdic-

tion of this Court is invoked under Sup. Ct. R. 10(a) but rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Attorney General and the Secretary of Homeland Security may grant asylum to an alien who is a "refugee," 8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)—*i.e.*, a person who is unable or unwilling to return to his country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A). Similarly, an alien is entitled to withholding of removal to a country if the alien's life or freedom would be threatened in that country "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

2. Petitioners are natives and citizens of Albania who entered the United States in late 1996. In May 1997, petitioner Anton Marku filed an application for asylum through counsel, with his wife, petitioner Roze Marku, and their children, petitioners Elde and Areta Marku, as derivative applicants. The application alleged persecution based on Anton Marku's political opinions and membership in a particular social group. In July 1997, the Immigration and Naturalization Service (INS)[1] commenced removal proceedings against petitioners, alleging that Anton and Roze Marku were present in the United States without having been admitted or paroled (in violation of 8 U.S.C. 1182(a)(6)(A)(i)) and that Elde

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[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

and Areta Marku had been admitted to the United States without proper documentation (in violation of 8 U.S.C. 1227(a)(1)(A)). Pet. App. B2-B3, E2-E3.

3. a. At the hearing before the immigration judge (IJ), petitioners were represented by Valerie Lisiecki and Noel Lippman. Counsel did not bring a copy of petitioner Anton Marku's asylum statement and had to borrow one from the INS attorney. Counsel also asked the IJ to consider a supplemental asylum statement, which had been prepared because the initial statement was incomplete, but the IJ declined to do so, because the supplemental statement had not been timely submitted. The IJ ruled, however, that Anton Marku would be allowed to testify to what was in the supplemental statement and that the supplemental statement would be admissible if the government raised a claim of recent fabrication. The IJ also allowed Anton Marku to make corrections to the initial statement. Pet. App. B3-B4.

At the conclusion of the hearing, the IJ found that petitioners were removable; denied their applications for asylum; construed their applications to be seeking withholding of deportation in the alternative and denied that form of relief as well; denied their requests for voluntary departure; and ordered them removed to Albania. Pet. App. E1-E19. In finding petitioners removable, the IJ relied on their concession that they were present in the United States in violation of the immigration laws. *Id.* at E2-E3. In denying their applications for asylum, the IJ found that petitioner Anton Marku's claim of mistreatment under the former Communist regime was not a basis for relief because of fundamental intervening changes in Albania, and that Marku had failed to establish that other mistreatment in that country was motivated, as he claimed, by his political opin-

ions. *Id.* at E13-E18. In denying withholding of removal, the IJ reasoned that there is a higher burden for withholding of removal than for asylum, and that, because petitioners had failed to establish an entitlement to asylum, they had necessarily failed to establish an entitlement to withholding of removal. *Id.* at E18-E19; see *id.* at E11-E13 (discussing legal standards). Finally, in denying voluntary departure, the IJ relied on the fact that petitioners were not physically present in the United States for at least one year between the time of entry and the time of service of the charging document, a prerequisite for voluntary departure. *Id.* at E19.

b. Petitioners, through Lisiecki, filed a notice of appeal with the BIA, asserting that the IJ had committed several errors in denying their applications for asylum.[2]

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[2] The notice of appeal included the following detailed statement of the grounds for appeal:

> 1. The Immigration Judge erred in finding that the Respondent did not qualify as a Refugee and that he did not show that he had a Well-Founded of Persecution [*sic*], despite the fact that Respondent presented substantial testimonial and documentary evidence that he did qualify as a Refugee and that he had a Well-Founded Fear of Persecution.
>
> 2. The Immigration Judge erred in determined [*sic*] that the Respondent had not demonstrated that he and his family had suffered past persecution and that he feared future persecution, even though at trail [*sic*] the Respondent presented substantial testimony and documentary evidence that he and his family has [*sic*] suffered past persecution and that He had a Well-Founded Fear of future persecution.
>
> 3. The Immigration Judge erred in finding that the Respondent's testimony, Demeanor and the documentation submitted was [*sic*] not credible even though at trial the Respondents [*sic*] testimony, demenor [*sic*] and documentation was credible, and that it was

Through Lisiecki, petitioners also filed a motion for a remand to the IJ for further proceedings, to allow them to apply for relief from removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess., 1465 U.N.T.S. 85. Although Lisiecki had indicated that she would file a brief in support of petitioners' appeal to the BIA, she failed to do so. While the appeal and the motion to remand were pending, the State of Michigan suspended Lisiecki from the practice of law and the BIA suspended her from

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believable, consistant [*sic*] and sufficiently, detailed to be found credible.

4. The Immigration Judge erred by placed [*sic*] undue weight on the opion [*sic*] issued by the State Department, and Judge [*sic*] ignored the testimonial and documentary evidence of the political problems, unrest, turmoil and persecution that still continues in Albania.

5. The Immigration Judge erred in finding that the Respondent and his family had no political activity despite the fact that the Respondent presented substantial testimonial and documentary evidence that he and his family were involved in political activilty [*sic*] and they had experinced [*sic*] past persecution and feared future persecution.

6. The Immigration Judge erred in finding that the documents were not credible and in questioning how the documents were obtained, despite the fact that the documents were legitimate, credible and could be obtained by family members or friends after the respondent had left Albania.

7. The Immigration Judge erred in finding that the Respondent did not merit the granting of asylum in the exercise of dicretion [*sic*].

Admin. R. 233.

practicing before the agency. The BIA sent suspended-attorney notices and briefing schedules to petitioners several times at the last address on file, but petitioners had moved and the documents were returned as undeliverable. A few months later, petitioner Anton Marku went to Lisiecki's office. Lippman told Marku that Lippman would be handling the appeal to the BIA, but did not tell Marku about Lisiecki's suspensions. Pet. App. B5-B6, D5; Admin. R. 221-223, 231-233.

The BIA dismissed petitioners' appeal and denied their motion to remand. Pet. App. D1-D7. In dismissing the appeal, the BIA agreed with the IJ's finding that petitioners had not left Albania "due to any political opinion, express or implied." *Id.* at D5. In denying the motion to remand, the BIA found that petitioners had failed to make a *prima facie* case that they would be tortured if they returned to Albania. *Id.* at D6 (citing 8 C.F.R. 1208.16(c)). The BIA's decision was mailed to petitioners, but it was returned as undeliverable. *Id.* at B6, D3 n.1.

4. According to petitioner Anton Marku, attempts were made to contact Lippman to check on the status of the case a number of times, both in the months before the BIA's decision and in the months after, but Lippman did not respond. Marku became aware of the BIA's decision in January 2005, 13 months after it was issued, when his children, petitioners Elde and Areta Marku, received notices to appear for their removal. At that point, Anton Marku contacted another lawyer, who filed a motion to reopen with the BIA, asserting that prior counsel had rendered ineffective assistance. Pet. App. B6, C3.

The BIA denied petitioners' motion to reopen. Pet. App. C1-C5. As an initial matter, the BIA stated that

petitioners' motion was untimely, "inasmuch as it was not submitted within 90 days of the Board's December 11, 2003, final administrative order." *Id.* at C3-C4 (citing 8 C.F.R. 1003.2(c)). The BIA then held that, even if it were to conclude that the limitation period should be equitably tolled, petitioners "have failed to establish that reopening is warranted," because they "have failed to demonstrate the requisite prejudice stemming from their former counsels' actions or inactions." *Id.* at C4 (citing *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.), review denied, 857 F.2d 10 (1st Cir. 1988), and *In re Assaad*, 23 I. &. N. Dec. 553 (B.I.A. 2003), review dismissed, 378 F.3d 471 (5th Cir. 2004)). In particular, the BIA explained, petitioners "have failed to establish that they would or might have been granted relief from removal had their prior counsels more diligently pursued their applications or kept them informed of developments in their case." *Ibid.* The BIA noted that petitioners had not "alleged specific errors in their prior counsels' presentation and development of their asylum claim before the Immigration Judge or the Board that would have affected the outcome of their case." *Ibid.* The BIA also noted that petitioners' "prior counsel submitted a detailed attachment to the Notice of Appeal * * * providing the reasons for [petitioners'] appeal, which was considered by the Board in reviewing the merits of [petitioners'] appeal." *Id.* at C5.

5. The court of appeals denied petitioners' petition for review in an unpublished opinion. Pet. App. B1-B19.

The court of appeals explained that it "reviews the BIA's denial of a motion to reopen for abuse of discretion"; that "motions to reopen, especially in deportation proceedings, are disfavored"; and that "the BIA has broad discretion to deny such motions." Pet. App. B7-

B8. The court then explained that, to prevail on their claim of ineffective assistance of counsel, which was based on the Due Process Clause of the Fifth Amendment, petitioners must show prejudice, which in this context means that, "but for the errors made by prior counsel," petitioners would be "entitled to the underlying relief requested"—*i.e.*, they would be "entitled to remain in the United States." *Id.* at B8-B9 (citing *Sako v. Gonzales*, 434 F.3d 857, 864-865 (6th Cir. 2006)). The court held that petitioners "cannot show that the actions or inactions of former counsel prejudiced [them]"; that "[their] claim of ineffective assistance of counsel [therefore] fails"; and that the BIA accordingly "did not abuse its discretion in denying the motion to reopen." *Id.* at B8.

The court of appeals rejected four specific claims of prejudice. Pet. App. B11-B19. First, the court rejected the claim that petitioners were prejudiced by "prior counsel's failure to file a brief in the appeal to the BIA." *Id.* at B11. The court explained that, "[a]lthough the government moved for summary dismissal for failure to file a brief, the BIA considered [the] grounds for appeal [in the notice of appeal] and agreed with the IJ's determinations on the merits," and petitioners "ha[ve] not established that the outcome of the appeal to the BIA would have been different had a brief been filed." *Id.* at B12. Second, the court rejected the claim that petitioners were prejudiced when, "because of [their] previous attorneys' failure to notify the BIA of Marku's new address and their failure to notify him of the decision of the BIA, [they were] foreclosed from appealing the decision of the BIA to this court." *Id.* at B14-B15. The court explained that the IJ denied the asylum application; that "[t]he BIA agreed with the IJ's determination

in the initial appeal"; and that petitioners "ha[ve] not introduced any evidence or made any argument suggesting how or why the outcome of [the] case would have been different after a substantial evidence review" by the court of appeals. *Id.* at B15-B16. Third, the court rejected the claim that petitioners were prejudiced by their attorneys' failure to notify them of the BIA's decision because they "accrued more than one year of unlawful presence, triggering a ten-year ban on readmission." *Id.* at B16. The court explained that "the prejudice inquiry in the context of ineffective assistance of counsel focuses on the effect of any errors on [petitioners'] right to remain in the United States," not on their ability to be readmitted after removal. *Id.* at B17. Finally, the court rejected the claim that petitioners were prejudiced by "errors committed by prior counsel at the merits hearing" before the IJ, *id.* at B18—in particular, counsel's failure to bring a copy of the asylum application to the hearing, counsel's assertedly incorrect translation of the initial asylum statement, and counsel's failure to file the supplemental asylum statement, *id.* at B9. The court explained that petitioners had "not shown how these errors had an impact on the outcome of [the] case." *Id.* at B18.

ARGUMENT

Petitioners renew their contention (Pet. 11-23) that the BIA abused its discretion in denying their motion to reopen the removal proceedings based on their claim of ineffective assistance of counsel. The court of appeals correctly rejected that contention, and its unpublished decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. As an initial matter, there is no basis in this Court's decisions for the proposition that aliens in removal proceedings have a due process right to the effective assistance of privately retained counsel. An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the Government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does *not* require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution, because counsel's ineffectiveness can be "imputed to the State" only when the Constitution itself requires the provision of counsel. *Id.* at 754; see also *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085-1086 (2007) (counsel's miscalculation of limitations period did not support equitable tolling, particularly in post-conviction context, where there is no constitutional right to counsel, even though State had appointed counsel for prisoner in that case); *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of affirmance of conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant in every suit and every administrative proceeding is entitled to due process, but it

> has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted); accord *Stroe* v. *INS*, 256 F.3d 498, 499-501 (7th Cir. 2001) (Posner, J.). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962); see also *Lawrence* v. *Florida*, *supra*.[3]

2. Even if aliens in removal proceedings do have a due process right to the effective assistance of privately retained counsel, as the BIA and the court of appeals assumed here, petitioners' right to the effective assistance of counsel was not violated. Petitioners contend (Pet. 11-20) that they were prejudiced by their prior counsel's performance—a universally recognized element of an ineffective-assistance claim in removal

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[3] In *In re Assaad*, 23 I. & N. Dec. 553 (B.I.A. 2003), review dismissed, 378 F.3d 471 (5th Cir. 2004), the INS argued that, in light of *Coleman*, aliens have no due process right to the effective assistance of counsel. The BIA declined to adopt that position, however, because of precedent in the courts of appeals that recognizes such a right. *Id.* at 558-560.

cases[4]—but the BIA and the court of appeals correctly held otherwise.

The court of appeals explained that prejudice in this context means that counsel's deficient performance affected the outcome of the proceedings—that, "but for the errors made by prior counsel," petitioners would have been "entitled to the underlying relief requested." Pet. App. B9. The BIA concluded that petitioners' motion to reopen did not "allege[] specific errors in their prior counsels' presentation and development of their asylum claim before the Immigration Judge or the Board that would have affected the outcome of their case." *Id.* at C4. The court of appeals likewise concluded that petitioners' brief in that court "d[id] not point to a failure to introduce or develop evidence at the merits hearing," *id.* at B18, and "fail[ed] to specify how the alleged errors of prior counsel prejudiced [them]," *id.* at B10. The same is true of petitioners' petition for a writ of certiorari in this Court. The petition makes no attempt to identify any evidence that counsel failed to introduce or develop. And it makes no attempt to explain how or why petitioners would have been granted asylum (or withholding of removal) if their prior counsel had done things differently in the removal hearing before the IJ; if their prior counsel had filed a brief (in

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[4] See, *e.g.*, *Zeng* v. *Gonzales*, 436 F.3d 26, 31 n.8 (1st Cir. 2006); *Cekic* v. *INS*, 435 F.3d 167, 171 (2d Cir. 2006); *Fadiga* v. *Attorney Gen. USA*, 488 F.3d 142, 155 (3d Cir. 2007); *Farrokhi* v. *United States INS*, 900 F.2d 697, 703 n.7 (4th Cir. 1990); *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Sako* v. *Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006); *Pavlyk* v. *Gonzales*, 469 F.3d 1082, 1091 (7th Cir. 2006); *Desna* v. *Gonzales*, 454 F.3d 896, 899 (8th Cir. 2006); *Serrano* v. *Gonzales*, 469 F.3d 1317, 1318-1319 (9th Cir. 2006); *Brue* v. *Gonzales*, 464 F.3d 1227, 1233-1234 (10th Cir. 2006); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005).

addition to a notice of appeal setting forth the grounds for appeal) before the BIA; or if their prior counsel had filed a petition in the court of appeals for review of the BIA's decision. See Pet. 11-20. Under these circumstances, petitioners cannot establish prejudice, and thus cannot establish ineffective assistance of counsel. In any event, the question whether prejudice has been shown on the particular record of this case involves only the fact-bound application of settled law, and "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioners offer no reason for treating theirs as one of the rare such petitions.

3. Petitioners contend (Pet. 21-22) that the court of appeals' decision conflicts with the Ninth Circuit's decisions in *Singh* v. *Ashcroft*, 367 F.3d 1182 (2004), and *Granados-Oseguera* v. *Gonzales*, 464 F.3d 993 (2006). That contention is mistaken.

In *Singh*, the Ninth Circuit found prejudice where counsel filed a notice of appeal in the BIA, indicated that he would file a brief, and then failed to do so in a timely manner. 367 F.3d at 1184. Counsel's failure to file a brief in that case, however, had resulted in the summary dismissal of the appeal. *Id.* at 1187-1188 (citing 8 C.F.R. 3.1(d)(2)(i)(D) (2002)). The Ninth Circuit held that, "[b]ecause the BIA summarily dismissed Singh's appeal for failure to file a brief, counsel's failure to file a timely brief deprived Singh of any meaningful review of the IJ's decision," and "[a] presumption of prejudice is thus warranted." *Id.* at 1189. The Ninth Circuit then held that the presumption of prejudice had not been rebutted. *Id.* at 1189-1190.

In this case, by contrast, counsel's failure to file a brief in the BIA did not result in the summary dismissal of petitioners' appeal. As the court of appeals explained, "[r]ather than summarily dismissing the appeal, the BIA stated in its opinion that [petitioners] failed to establish entitlement to asylum." Pet. App. B5. Unlike in *Singh*, therefore, the failure of petitioners' counsel to file a brief did not deprive petitioners of "any meaningful review of the IJ's decision," *Singh*, 367 F.3d at 1189; the BIA reviewed the IJ's decision and determined that it was correct, see Pet. App. D4-D5. For that reason, had this case arisen in the Ninth Circuit, *Singh*'s presumption of prejudice would have been inapplicable, and there is no reason to think that the result would have been any different.

The Ninth Circuit's decision in *Granados-Oseguera* has even less in common with this case. In that case, the IJ ordered the alien removed, the alien's counsel appealed the IJ's decision to the BIA, and the BIA affirmed the IJ's decision and gave the alien 30 days to depart voluntarily. 464 F.3d at 995-996. Counsel then filed a motion to reopen so that the alien could seek adjustment of status. *Id.* at 996. The BIA denied the motion because it had not been filed within the 30-day period for voluntary departure. *Ibid.* The Ninth Circuit found that counsel's inadequate performance prejudiced the alien because the BIA might have found that the alien was eligible to seek adjustment of status and thus might have granted the motion to reopen if it had not been untimely. *Id.* at 999. *Granados-Oseguera* provides no basis for a conclusion that the Ninth Circuit would have found prejudice on the very different facts of this case.

Petitioners contend that the decision below conflicts with *Singh* and *Granados-Oseguera* because the Ninth Circuit in those cases required that the alien show only a "plausible" basis for relief, whereas the court of appeals in this case applied a "but for" test. Pet. 21-22 (citing *Singh*, 367 F.3d at 1189, and *Granados-Oseguera*, 464 F.3d at 999). That contention confuses apples and oranges. Courts undertaking the prejudice inquiry *always* ask whether, "but for" counsel's deficient performance, there is some degree of probability that the alien would have been granted relief. In requiring a "plausible" basis for relief, the Ninth Circuit was addressing the requisite degree of probability—*i.e.*, it required the alien to show that, but for counsel's deficient performance, the alien could "plausibly" have been granted relief. See *Granados-Oseguera*, 464 F.3d at 998-999; *Singh*, 367 F.3d at 1189. The court below did not address the standard of probability.

As petitioners acknowledge (Pet. 21-22), moreover, in both *Singh* and *Granados-Oseguera* the Ninth Circuit held that counsel's error had caused the BIA to reject the alien's claim for procedural reasons without considering the merits. See *Singh*, 367 F.3d at 1187-1188, 1189; *Granados-Oseguera*, 464 F.3d at 999. It was in that context that the Ninth Circuit referred to a "plausible" basis for relief. In this case, by contrast, the BIA considered the merits of petitioners' claims on their appeal. Petitioners therefore were not prevented from having their claims heard on the merits. In any event, there is no reason to think that the result would have been different if, like the Ninth Circuit in *Singh* and *Granados-Oseguera*, the court below had explicitly asked whether there was a "plausible" basis for relief but for counsel's deficient performance, because peti-

tioners have not identified any basis for concluding that the result would have been different under any conceivable standard of probability (*e.g.*, plausible basis, reasonable probability, or more likely than not).

Petitioners also suggest (Pet. 22-23) that the court of appeals' decision conflicts with the Second Circuit's decision in *Yang* v. *Gonzales*, 478 F.3d 133 (2007), and the Fifth Circuit's decision in *Mai* v. *Gonzales*, 473 F.3d 162 (2006). That contention is likewise mistaken, because neither case addressed the question of prejudice. In *Yang*, the Second Circuit reversed the BIA's finding that the alien had not complied with the procedural requirements for raising a claim of ineffective assistance of counsel, 478 F.3d at 142-143, and "le[ft] the question of prejudice for determination by the BIA" on remand, *id.* at 143. In *Mai*, the Fifth Circuit reversed the BIA's finding that counsel's performance was not deficient, 473 F.3d at 166-167, and "remand[ed] the case to the BIA for consideration of whether * * * [the alien] was prejudiced," *id.* at 167.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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